Case Number: 1400963/2021

THE EMPLOYMENT TRIBUNALS

Claimant: **Mr Constantin Mosnegutu**

Respondent: **Bighams Ltd**

Heard at: **Bristol (By CVP)** **On:** **4, 5, 6 September 2023**

Before: **Employment Judge Beever, sitting alone**

Representation:

Claimant: **in person**
Respondent: **Ms Gardiner, counsel**

RESERVED JUDGMENT AND REASONS

1. The claimant's claim for **unfair dismissal** pursuant to section 98 ERA is not well founded and is dismissed

2. The claimant's claim for **wrongful dismissal** (breach of contract) is not well founded and is dismissed

3. By consent, the claimant's claim for **holiday pay** succeeds, and the respondent is ordered to pay to the claimant the agreed sum of £648.96

4. The claimant's claim for **unauthorised deductions of wages** pursuant to section 23 ERA is not well founded and is dismissed

REASONS

Introduction

1. On 6 September 2023, at the conclusion of the CVP hearing that had taken place over the course of 3 days, I gave an oral judgment with reasons. I dismissed the

claimant's claim of unfair dismissal and his other claims save an agreed liability in respect of holiday pay. Neither party requested written reasons. On 8 September 2023, the respondent requested written reasons.

2. The claimant is a litigant in person. He has conducted this case himself throughout, having previously attended 2 preliminary hearings. He has presented his case carefully and respectfully and I am grateful to him for that.

3. By an ET1 claim form presented on 25 February 2021, the claimant brought a complaint of unlawful race discrimination, ordinary unfair dismissal, wrongful dismissal, holiday pay and unauthorised deduction of wages. Further particulars relating to the claimant's claim were set out in his further information at [19] and at [39].

4. The claimant's discrimination claims were the subject of a deposit order on 17 August 2022. The claimant did not pay the required deposit. Consequently, on the 18 October 2022 [86], the claimant's claims of unlawful discrimination were struck out and dismissed.

5. There is some procedural history which needs to be mentioned briefly. Previous case management directions required witness statements to be exchanged by 2 November 2022. The respondent wrote to the tribunal on 24 May 2023 regarding the lack of an agreed bundle or witness statements. The matter came before EJ Bax on 8 August 2023, at which the claimant did not attend (he later explained his unfortunate situation regarding the ill-health of the member of his family). EJ Bax set out the issues, which I shall return to later in these reasons. EJ Bax also ordered an exchange of witness statements by 23 August 2023.

6. The claimant did not comply. The respondent applied for a strike out. In the event the application came before EJ Dawson on the Friday before the hearing. EJ Dawson refused to strike out, whilst reserving the powers of the hearing judge to deal with the management of the hearing. EJ Dawson regarded the bundle as final and said that if the claimant wished to adduce evidence, including for himself, he would need the permission of the hearing judge.

7. On the first day of the hearing, the claimant confirmed that he wished to give evidence. He said that he had not done a witness statement because he felt that the respondent "already knew" what he was going to say as it was set out in the documents. I took account of the fact that English was not the claimant's first language nevertheless the orders of the tribunal have been perfectly clear. I took into account that an ordinary unfair dismissal case begins with the respondent having to establish its reason for dismissal. I took into account what the respondent "already knew" by reference to the claimant's further information and his pleaded case. The respondent had wisely unilaterally sent their witness statements to the claimant on the Friday before the hearing.

8. I had regard to the overriding objective which in essence requires that the tribunal should aim to deal with cases promptly and having all the available material facts before them provided no undue unfairness arises. Having considered all the circumstances, and notwithstanding the objection of the respondent, I gave the

claimant permission to give evidence based upon his claim form and his further information at [19] and at [39]. The respondent was then at liberty to cross examine as they felt appropriate.

9. There were no other witnesses for the claimant. He had presented a statement from Mr Bogdan. In the event, this witness was not present to be cross-examined and I took the view that the statement did not in any event materially assist with regard to the issues that needed determining.

10. I had a final bundle of 546 pages. I heard the claimant's evidence, and he was cross-examined. The respondent's witnesses were Mr Wrzesniewski, the decision maker, and Mr Czuba, the appeal officer. Both were cross examined. Having heard the witnesses give evidence and be cross-examined and having had the opportunity to consider the bundle, I was able to make findings of fact on relevant issues that were necessary for the determination of the claim.

The issues

11. The issues were clearly set out by EJ Bax on 8 August 2023. At the outset of this hearing the parties were reminded that those issues represented the "roadmap" which would guide the tribunal on the questions that need to be determined in this case. The parties agreed that they were the relevant issues at the outset of the hearing and I informed both parties that questions in cross examination and in respect of closing submissions should focus on the "roadmap" in order to be of greatest benefit.

12. The issues to determine are:

1. Unfair dismissal

    1.1 It is not in dispute that the Claimant was dismissed.
    1.2 What was the reason for dismissal? The Respondent asserts that it was a reason related to conduct, which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996. The Claimant contends that he was dismissed because he was not part of the right familial group, in the workplace and that a case was built against him for bringing a grievance.
    1.3 Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances? The burden of proof is neutral here but it helps to know the Claimant's challenges to the fairness of the dismissal in advance and they are identified as follows;
        1.3.1 There was no investigation report;
        1.3.2 The allegations of aggressive behaviour by him are untrue, based on false statements by four witnesses, provided under pressure;
        1.3.3 The Respondent relied on contradictory evidence;
        1.3.4 They failed to take account of evidence from two witnesses of his, Messrs Radu and Stoicr.

1.4 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts? In this respect, the Respondent points to the Claimant already being on a final written warning.
1.5 Did the Respondent adopt a fair procedure? The Claimant challenges the fairness of the procedure, as his grievance was not investigated and was thus a breach of the ACAS Code.
1.6 If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?
1.7 If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

2. Wrongful dismissal; notice pay

2.1 What was the Claimant's notice period?
2.2 Was the Claimant paid for that notice period?
2.3 If not, was the Claimant guilty of gross misconduct or did he do something so serious that the Respondent was entitled to dismiss without notice?

3. Holiday Pay (Working Time Regulations 1998)

3.1 Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when their employment ended?
3.2 What was the Claimant's leave year?
3.3 How much of the leave year had passed when the Claimant's employment ended?
3.4 How much leave had accrued for the year by that date?
3.5 How much paid leave had the Claimant taken in the year?
3.6 Were any days carried over from previous holiday years?
3.7 How many days remain unpaid?
3.8 What is the relevant daily rate of pay?

4. Unauthorised deductions (Part II of the Employment Rights Act 1996)

4.1 Did the Respondent make unauthorised deductions from the Claimant's wages, in respect of a bonus payment and if so how much was deducted?
4.2 Was any deduction required or authorised by a written term of the contract?
4.3 Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?
4.4 Alternatively, did the Claimant agree in writing to the deduction before it was made
4.5 How much is the Claimant owed?

13. In the event, the respondent accepted that the claimant's holiday pay claim was well founded. The parties agreed that the amount outstanding was £648.96. I say no more about liability for the holiday pay claim in these reasons.

The Facts

14. The respondent is a company which manufactures pre-prepared meals, available in retail outlets across the UK. Its principal production site is in Dulcote near Wells. The claimant was employed at Dulcote from 23 April 2018, most recently as a Production Team Member, until his employment was terminated on 16 December 2020, the respondent says, for misconduct.

15. The claimant's contract of employment [109] entitled him to one week's notice for each complete year of service. In his case, he had two complete years of service at the time of dismissal and was accordingly entitled to contractual notice of two weeks. I was not informed of any alternative contractual basis for notice.

16. The claimant worked on the production line. In January 2020, the claimant was subject to disciplinary investigation as a result of a complaint by a colleague, Amy Payne, that he had been eating a product on the production line. The disciplinary hearing took place on 22 January 2020, chaired by Mr Howell the production manager, who was satisfied that there was insufficient evidence to maintain any disciplinary outcome and accordingly the claimant was not subject to any sanction.

17. No record has been kept of what if anything was said to Ms Payne following the process. The claimant says that this investigation was "proof" that Ms Payne would lie. Mr Howell's expressed conclusions are not consistent with a view that Ms Payne had lied. In any event I note that Mr Wrzesniewski was not aware of the nature and content of the January investigation when he later undertook the disciplinary hearing in December 2020.

18. Later in 2020, the claimant complained of poor treatment at the hands of a team leader, Max Dudarev, this is described in the tribunal paperwork, for example at [19], as discriminatory. The claimant and Mr Dudarev had at times a difficult relationship. A "file note" is a means by which the respondent records management interactions with colleagues. At [124], a file note shows Mr Dudarev recording an alleged performance issue relating to the claimant not clocking in on time on 21 April 2020. The claimant says that this was an example of retaliation and discrimination by Mr Dudarev in that nobody else was "persecuted" as he was. Later that day, another colleague, Agata, had written an email complaining of Mr Dudarev's conduct. That email resulted in an investigation. There is a report, undated, at [248]: although it is untitled, I am satisfied that the report is of sufficient similarity to Agata's email of complaint that the report is evidence that the respondent had investigated the complaints that had been raised by Agata. On the face of it, there was an appropriate investigation.

19. The claimant was subject to disciplinary action in August 2020. At [134], the claimant was invited to disciplinary hearing in respect of a conduct allegation of threatening behaviour towards Mr Dudarev. The disciplinary hearing took place on 13 August 2020, chaired by Mr Strange, production manager. The claimant rejected the

allegation and raised his unhappiness about Mr Dudarev's conduct in general. The minutes of the meeting indicate that the claimant's response was discussed and taken into account.

20. There was a verbal outcome in clear terms that the claimant was the subject of a Final Written Warning, to be on his file for 12 months. See [142]. At the same time, Mr Strange said "I would like to move you to packing". The claimant responded that, "I talked to Joanna before and asked to change department. You read my mind. I think she forget I said to her I think it's better if I go to the other side". I find that the move to the packing department was not a sanction. In any event the claimant was happy with the move, as indicated by his words, "you read my mind".

21. The written outcome was, consistent with the respondent's practice at the time, sent to his home address, and he moved to the packing department in accordance with the discussion with Mr Strange.

22. The claimant did not appeal the Final Written Warning. He says he did not receive the written outcome until the later December process, but I find that he was given a verbal outcome in clear terms, and I find that he knew and understood the outcome in terms that it was a Final Written Warning. If he had not received an outcome and/or did not understand it, then it is odd that he had not chased up the outcome at any point. If he needed/wanted to appeal, then he would have needed the documentation to do so. I note that, later in December 2020, he did not wait for the written outcome of the December process before commencing an appeal.

23. That is how matters were in August 2020. Regrettably for the claimant, a further incident occurred in November 2020.

24. On 19 November 2020, on the packing line, an incident occurred. The claimant was working on a pallet as seen on the plan at [546], and it was near to the end of the shift. The claimant had cause to come to the turntable end of the line (which is where the packing of dishes into boxes takes place). A colleague, Violetta Mroczek, worked at that station. The claimant spoke to her. This resulted in Ms Mroczek becoming very upset and leaving the work station before the end of her shift. In her statement to the investigation, at [155] Ms Mroczek said, "I get really upset and stressed and I couldn't stay any longer so I went home".

25. An investigation was triggered by a manager, Joanna Urbanska, when a colleague had brought the incident to her attention. Ms Urbanska took statements between 25-30 November 2020 from Ms Mroczek [155], Andrew Blair [156] and Amy Payne [163].

26. Ms Mroczek had a poor command of English and she did not understand the words that the claimant had used but the effect on her ("very upset" etc) was clear. Mr Blair described how there had been a backlog of boxes to be packed which was, "no doubt stressful", and he witnessed the claimant walk from his section towards Ms Mroczek and "just started shouting" stating "you are stupid, do you not understand" and he saw the claimant, "lean over in front of her face". Ms Payne, in a later statement of 30 November 20, also saw the claimant go over to Ms Mroczek and

"really firmly" say, "I don't know what your problem is" whereupon Ms Mroczek "gets red in her face" and becomes even more upset and goes home.

27. After a short delay caused by COVID-related isolation, the claimant was invited to a disciplinary hearing by letter dated 10 December 2020, at [167]. The letter encloses copies of the statements taken. It informs the claimant of the allegation of "aggressive behaviour". It informs the claimant of his Final Written Warning and informs him of the risk of a sanction up to and including dismissal.

28. The invitation letter included an additional allegation, a "failure to follow a management instruction". This is reflected in a file note compiled by Ms Urbanska relating to the claimant's alleged poor behaviour on 24 November 2020 in failing to "show respect" to a team leader who was seeking to challenge the claimant regarding his late clocking in. The claimant is alleged simply to have been "rude and just walked away".

29. At the same time as the disciplinary investigation was underway the claimant had raised a grievance on 25 November 2020, at [160]. This grievance made general allegations of discrimination and of unfair and preferential practices in the workplace. The claimant relies on the timing of his grievance to indicate that the disciplinary process was more than a coincidence and it was in fact a process designed to "eliminate him". There was a grievance meeting on 9 December 2020, at [165], chaired by Leigh Glanville, People Manager, to gain further insight into the grievance and to commence an investigation. There were later interviews of colleagues on 11 and 12 January 2021, at [211 and 219]. The outcome of the grievance is dated 19 January 2021, at [229], which did not uphold the claimant's grievance. The grievance finding was that the respondent had escalated complaints appropriately (for example, the Agata complaint) and in relation to the claimant's complaint that Mr Dudarev had moved into the packing department, having been investigated, this was not upheld.

30. The disciplinary hearing took place 16 December 2020. The minutes are at [168]. The decision-maker was Mr Wrzesniewski. The claimant was asked for his version of events of the incident on 19 November 2020. He said that Ms Mroczek's statement was "inspired", i.e., fabricated, by Ms Urbanska, the investigator. In response to Ms Payne's and Mr Blair's statements, he said that they were "different" and "contradictory" and that one of them must therefore be lying. He went on to say that Mr Blair was lying as he was too far away to have witnessed the incident, and that Ms Payne had already shown herself capable of lying (cf the January incident). The claimant did say that he tried to talk to Ms Mroczek. The claimant was also asked about his version of events regarding Ms Urbanska's file note of 24 November 2020.

31. Mr Wrzesniewski suggested to the claimant that the incident, like the one in August, indicated that the claimant had aggressive behaviour. He asked the claimant a direct question as to whether the claimant could persuade him that there would not be repeated behaviour. The claimant said in response, "what I want to tell you is this behaviour is invented". That was a surprising response; and Mr Wrzesniewski commented that, "we have three statements, the file note that you signed. I think there is enough evidence".

32. After a short adjournment, Mr Wrzesniewski informed the claimant that he found the claimant to be responsible for serious misconduct and along with the final written warning, the appropriate sanction was that the claimant would be dismissed.

33. On 18 and 20 December 2020, the claimant spoke to other colleagues, Stefan Radu and Edward Stoicr. See [184]. He drafted an appeal letter on 21 December 2020, at [196]. In his appeal, he claimed that the outcome was disproportionate. He said that the respondent had "refused my request to question other colleagues" and specifically had omitted a statement from the team leader Mr Radu. He also repeated that the contradictions in the three witnesses' statements meant that they could not be truthful.

34. The appeal was dealt with by Mr Czuba. He had noted the appeal letter included a complaint regarding the omission of a statement from Mr Radu. Accordingly, prior to the appeal hearing, a statement was obtained from Mr Radu, and that was provided to the claimant along with an invitation to a disciplinary appeal hearing. In fact, Mr Radu had told Mr Czuba that he had not heard anything said between the claimant and Ms Mroczek on 19 November 2020. He also told Mr Czuba in response to a general question as to whether he wanted to add anything, that "sometime in the past… You can't ask [the claimant] to do a job because he's getting aggressive"

35. The disciplinary appeal hearing took place on 18 January 2021. Mr Czuba asked the claimant if he had any additional evidence. The claimant provided new evidence relating to Mr Radu and also a statement from Mr Stoicr. The statement from Mr Stoicr does not add anything as he did not see the incident. The statement from Mr Radu suggests a different version than the one that Mr Czuba had himself obtained from Mr Radu. Mr Czuba explained that he was cautious about the new evidence but remained satisfied with what Mr Radu had said to him when he provided his signed statement, and Mr Czuba believed that to be true.

36. As the Grounds of appeal also contained an assertion that the claimant believed that one or more of the witnesses were lying, Mr Czuba decided to interview all the witnesses again. It confirmed that Mr Stoicr had seen nothing. Regarding Ms Mroczek, Ms Payne and Mr Blair, each provided a plan and it was apparent that they felt that Mr Radu was likely to have been furthest away in any event. Those witnesses confirmed the truth of their earlier statements. Ms Mroczek confirmed that the incident had been "bad" and that she was very upset and did go home because she couldn't include handle the situation". Each witness signed again to confirm that their earlier statements were true. The appeal outcome sent to the claimant on 25 January 2021, and is at [231]. The claimant's dismissal was upheld.

The Law

37. In relation to unfair dismissal, section 98(1) and (2) of the Employment Rights Act 1996 sets out the potentially fair reasons for dismissal. Section 98(2) states that a reason falls within this subsection, inter alia, if it relates to conduct.

38. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Birchell [1980] ICR 303, a tribunal must consider a three-fold test: (i) the employer must show that he believed that the employee was guilty of misconduct, (ii) that he had in his mind reasonable grounds upon which to sustain that belief, (iii) that at the stage at which the employer formed that belief he had carried out as much investigation into the matter as was reasonable in the circumstances.

39. Section 98(4) then sets out what needs to be considered in order to determine whether or not the decision is fair. It states "termination of the question whether dismissal is fair or unfair…. (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and (b) shall be determined in accordance with equity and the substantial merits of the case".

40. For the purpose of section 98(1) and 98(2) the burden of proof is on the respondent. What matters is whether the respondent has established the operative reason for the dismissal: see Brady v ASLEF [2006] IRLR 576.

41. For the purpose of section 98(4) the burden of proof is neutral in applying section 98(4). I remind myself that it does not stand in the shoes of the employer and decide what I would have done if I were the employer. Rather I have to ask whether the decision to dismiss fell within the range of reasonable responses open to the employer judged against the objective standards of a hypothetical and reasonable employer. The case of Sainsbury's Supermarket Ltd v Hitt [2002] EW CA Civ 1588 makes it clear that the range of reasonable responses that applies to all aspects of the dismissal decision. I am required to consider whether dismissal fell within the range of reasonable responses see Iceland Frozen Foods v Jones [1983] ICR. Here the question of whether an employer has acted reasonably in dismissing will depend upon the range of responses of reasonable employers. Some might dismiss others might not.

42. Turning to deductions from compensation, the Polkey principle established that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact**.** Thornett v Scope [2007] ICR 236 affirmed the obligation on an employment tribunal to consider what the future may hold regarding an employee's ongoing employment.

43. Section 122(2) ERA provides that where a tribunal finds that any conduct of a claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the tribunal must reduce that amount accordingly. Section 123(6) ERA provides that where a tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable. Before any such deduction, a tribunal most make three findings (in accordance with Nelson v BBC (no2) [1979] IRLR 346): (i) that there was conduct which was culpable or blameworthy; (ii) that the dismissal was contributed to some

extent at least by the claimant's culpable or blameworthy action, (iii) that it is just and equitable to reduce the assessment of the claimant's loss to a specified extent.

44. In respect of a Final Written warning, REJ Pirani had set out the position clearly on 16 March 2022, at [60] when he stated, when considering whether dismissal was reasonable in all the circumstances, under section 98(4) of the Employment Rights Act 1996, the tribunal cannot not look behind the final written warning which was not "manifestly inappropriate", applying the test in Davies v Sandwell MBC [2013] IRLR 374 and Wincanton Group v Stone [2013] IRLR 178. This case law raises the factual question of whether the warning was manifestly inappropriate or otherwise whether there are facts which require me to revisit the warning.

45. Wrongful dismissal requires a different test. It is necessary for a tribunal to reach a finding of fact as to whether the claimant had in fact committed a breach of his contract sufficiently serious that it amounted to a repudiatory breach which entitled the respondent to terminate the contract without notice. If not, then a breach of contract occurs when the respondent terminates without notice, and the usual measure of damages is the contractual notice period that the claimant was entitled to.

Discussion and Conclusions

46. It is important to identify my task in deciding this case. The issues that I have to determine are those set out in the order of EJ Bax and as agreed by the parties beginning of this hearing.

47. The claimant claims unfair dismissal. This requires me to answer two key questions.

48. The first, section 98(2) of ERA, is to determine the reason for dismissal. The law says that the burden is on the respondent to prove the reason. There is no dispute that there has been a dismissal.

49. The respondent says that the reason is conduct. The evidence relied on by the respondent comes from Mr Wrzesniewski. The claimant does not suggest that Mr Wrzesniewski was not telling the truth or that he himself had an ulterior motive. The evidence of what is in the mind of Mr Wrzesniewski at the point of dismissal is vital. I have seen the minutes of the disciplinary hearing, and the dismissal letter which clearly identifies the reasons for dismissal. I have listened to the evidence and cross-examination of Mr Wrzesniewski and I consider that he has provided me with honest and genuine evidence which I accept.

50. The claimant says that there was a different reason for dismissal. He says that he was not part of a familial group, and the case was built against him because he had brought a grievance. For the claimant to succeed in that argument, the tribunal needs to see at least some supportive evidence. There is evidence of some unhappiness in the workplace. Agata had raised a complaint in April 2020 and the claimant himself had raised a complaint in November 2020. It might be said that both

of these complaints referred to preferential treatment in the workplace. However both were properly and effectively investigated by the respondent. The fact that the respondent did properly investigate does not therefore support the claimant's suggestion that the respondent would act to the claimant's disadvantage because he brought a grievance. The claimant did not provide evidence to explain why he thought that Ms Urbanska had an ulterior motive in commencing an investigation once the incident of 19 November 2020 had been brought to her attention.

51. The claimant has not established evidence that the real reason for his dismissal was either because he was not part of a familial group or that he had raised a grievance. First, Mr Wrzesniewski was not aware of the grievance and it could not therefore have affected his decision. Secondly, Mr Wrzesniewski was objective and separate from the workplace and was thus ideal to act as a decision maker and was not influenced by what might have been in the workplace environment. Thirdly, Mr Wrzesniewski was not in fact challenged about the familial group or the preferential treatment. Fourthly, I accept his evidence that in dismissing the claimant he relied on the two key elements of the Final Written Warning imposed on the claimant on 13 August 2020 and his finding that the incident on 19 November 2020 was misconduct on the part of the claimant, both of which issues were fully aired at the disciplinary hearing.

52. I find that the respondent has discharged the burden of establishing that the reason, for dismissal, namely conduct, was a potentially fair reason.

53. The second question I have to decide, pursuant to section 98(4) of ERA, is whether the reason was a sufficient reason in all the circumstances to justify the dismissal of the claimant. There is no burden of proof in this respect and I have to decide the question on the basis of all the evidence before me.

54. Did Mr Wrzesniewski hold a genuine and reasonable belief? There were three key witnesses to the incident involving Ms Mroczek. Inevitably there will be differences between their accounts (indeed I accept Ms Gardiner's submission that it might be worrying if they were exactly the same). Mr Wrzesniewski recognised that all three had witnessed the incident. He was entitled to take the view, as he did, that it may not matter if Ms Mroczek did not understand the words said as what she plainly did say [155] in the investigation was that she had got really upset and stressed and couldn't stay any longer so that she had to go home. Mr Wrzesniewski took account of both Mr Blair and Ms Payne describing variously that the claimant was "shouting", had said that Ms Mroczek was "stupid" and didn't understand [156] and that said to her "I don't know what your problem is" [163]. Mr Wrzesniewski was fully entitled to take account of the claimant's response. See in particular Mr Wrzesniewski's witness statement at paragraph 18 where the claimant suggested that witnesses were lying and the investigator had "inspired" (fabricated) the statements. Mr Wrzesniewski rejected that, as he was entitled to do. He held a genuine and reasonable belief as to the conduct of the claimant being aggressive.

55. Was there a reasonable investigation? Ms Urbanska interviewed a number of witnesses to the incident. Mr Wrzesniewski conducted a reasonable and fair

disciplinary hearing during which the claimant had ample opportunity to air his version of events. The claimant did not specifically complain to Mr Wrzesniewski that witnesses had been omitted. When the claimant appealed to Mr Czuba, he said essentially that key witnesses had been omitted and that the existing witnesses were contradictory and unreliable. Mr Czuba then dealt with those matters in the appeal.

55.1. In advance of the appeal hearing, he obtained a statement from Mr Radu. The claimant produced a different version from Mr Radu in the course of the appeal hearing but Mr Czuba, as he was entitled to do, considered that it was fair for him to rely upon the statement (signed) that he had obtained in part because he was uncertain of the personal dynamics between the claimant and Mr Radu.

55.2. It is significant also that after the appeal hearing all the witnesses were reinterviewed. They confirmed the truth of their earlier statements. They placed Mr Radu furthest away in terms of the actual incident.

55.3. Mr Stoicr plainly had nothing to add to the events.

56. The claimant says that there was no investigation report. The respondent's policy did not require one. What matters is not whether there was a report but whether the claimant was aware of the substance of the allegations and had a fair opportunity to respond. A requirement for a report would be to put form over substance. The claimant was aware of the allegations as he received the witness statements prior to the hearing and had a fair opportunity at the hearing to respond. Indeed he took that opportunity but regrettably perhaps he did not help himself as it is apparent he did not reflect on his own account of the incident but preferred instead to suggest that the witnesses and the investigator were each in turn lying. As I said, it was not unreasonable for Mr Wrzesniewski to reject that alternative explanation.

57. The claimant says that the allegations and statements are untrue and provided under pressure. There is no evidence of undue pressure coming to bear on any witness: even in circumstances where Mr Radu and Mr Stoicr provided evidence directly to the claimant, they have not suggested that they were under pressure in any way. The claimant has not established that the allegations and statements are untrue and as I have said already, it was not unreasonable for Mr Wrzesniewski to reject that alternative explanation. The claimant complains that the respondent had failed to take account of evidence from Mr Radu and Mr Stoicr. The claimant did not raise this at the disciplinary hearing but regardless it was clearly part of a comprehensive and open-minded appeal process.

58. Was the decision to dismiss a fair sanction? The claimant already had a Final Written Warning against him. I have considered whether there are circumstances which required me to revisit that warning. The claimant alleges that he did not get the written outcome from August 2020. He was however aware of it at least in the context of it being referred to within the invite to the disciplinary hearing.

59. There is no basis on which I should revisit that warning. It had been imposed on the claimant on 13 August 2020 following a reasonable investigation and a disciplinary hearing in which the claimant had a fair opportunity to defend himself. It was a fair

process and the claimant was verbally informed at the disciplinary hearing on 13 August 2020 that he was the subject of a Final Written Warning. I find that the only potential basis for revisiting the warning is that the claimant contended that he was not aware of it. I have found that he was aware and understood following its verbal communication on 13 August 2020.

60. Further, Mr Wrzesniewski was entitled to conclude that, within a short period of time following the Final Written Warning, the claimant had in effect repeated his behaviour of a similar type. In other words, Mr Wrzesniewski was entitled to find the claimant guilty of misconduct on 19 November 2020 which was a short period after the imposition of the Final Written Warning for similar conduct.

61. I remind myself that the relevant question is whether the decision to dismiss was within the range of reasonable responses open to a reasonable employer when faced with these facts. Some employers might have dismissed others might not. The respondent did not act unreasonably in deciding to dismiss on these facts.

62. Did the respondent adopt a fair procedure? The respondent adopted an entirely fair procedure. It carried out an appropriate investigation and invited the claimant to a disciplinary hearing. He was provided with all the relevant witness statement evidence and knew that he was at risk of dismissal. He had a full opportunity at the disciplinary hearing to defend himself. The decision to dismiss was taken by an independent decision maker. The appeal was extremely careful and, to the extent that there was any shortcoming in the initial process, the fact that all witnesses were reinterviewed reinforces the fairness of the process.

63. The claimant was not unfairly dismissed. His claim is not well founded and therefore fails.

64. Turning to wrongful dismissal, I find that the claimant was not wrongfully dismissed. I find that he was the subject of a Final Written Warning. I also find on the facts that he did commit serious misconduct on 19 November 2020 when he was aggressive towards his colleague and in circumstances where he had clearly exhibited aggressive behaviour on other occasions including in respect of the matter which culminated in the Final Written Warning. I find that the respondent was entitled to dismiss the claimant without notice.

65. Had the claimant been entitled to notice, then according to his contract he would have been entitled to one week's notice per year of service. In his case that would have afforded him two weeks' notice. In any event the respondent has paid him in respect of three weeks' notice. I note that they had offered to pay him four weeks' notice. That is a matter for the respondent and no liability arises from his judgement in that respect.

66. As to the matter of holiday pay, this was agreed by the parties at the outset of the hearing and judgment will be entered in the agreed sum of £648.96.

67. Finally as to the deductions of wages claim, this claim is not well founded and is dismissed. In discussion with the claimant he agreed that he was not in fact making a contract claim but that he agreed that his complaint (relating to the payment of money based on "thank you's" from colleagues that are received in the workplace) in fact related to his discrimination claims which have been previously dismissed.

.

_____
EMPLOYMENT JUDGE BEEVER
Date: 25 September 2023

JUDGMENT WITH REASONS

SENT TO THE PARTIES ON

17 October 2023 By Mr J McCormick

FOR THE TRIBUNAL